

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PARNELL,

Defendant-Appellant.

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UNPUBLISHED

November 16, 2004

No. 248611

Wayne Circuit Court

LC No. 03-001658-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of six counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to twenty-eight to seventy-two months' imprisonment for the felonious assault convictions and twenty-eight to ninety months' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm, but remand for correction of judgment of sentence.

**I. Facts**

On October 27, 2002, Stephanie Hampton was driving Taniesha Norfolk, Nyeisha Coles, Latoya Johnson, and Johnson's eight-month-old baby, Deandre, down 33<sup>rd</sup> Street in Detroit when she drove by a burned-out house from which defendant was known to sell marijuana. While Hampton and the others were looking at the house to survey the recent fire damage, defendant emerged from between the house and the adjacent house. Defendant and two other men began shooting at the car, hitting the car several times, but not any of its passengers. When Hampton drove away to escape, defendant and the other men pursued the car, still shooting. Hampton did not know why defendant was shooting at them, but knew that defendant had a dispute with a person who owned a similar model car.

In support of defendant, defendant's cousin testified that defendant was with her at home at the time of the shooting.

**II. Analysis**

**A. Unendorsed Witnesses**

Defendant first argues that the trial court erred in allowing the prosecution to call two res gestae witnesses,<sup>1</sup> Tanisha Norfolk and Nyeisha Coles, to testify at trial even though they had not been endorsed on the prosecution's witness list before trial. We review a trial court's decision whether to allow a late endorsement of a witness for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003).

MCL 767.40a(3) requires the prosecution to send to the defendant, not less than thirty days before trial, a list of the witnesses the prosecution intends to produce at trial. However, MCL 767.40a(4) permits the prosecution to endorse a witness "at any time upon leave of the court and for good cause shown or by stipulation of the parties." Here, the prosecution did not move to endorse Norfolk or Coles until the first day of trial. The prosecution does not dispute defendant's contention that the prosecution failed to show good cause for the late endorsement. Thus, the prosecution violated MCL 767.40a(3) and MCL 767.40a(4).

In the case of noncompliance with MCL 767.40a, the trial court must exercise its discretion in fashioning a remedy for the noncompliance. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). In fashioning a remedy, "there must be a fair balancing of the interests of the courts, the public, and the parties . . . ." *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). The defendant is not automatically entitled to the exclusion of otherwise admissible evidence. *People v Paris*, 166 Mich App 276, 281; 420 NW2d 184 (1988). Rather, "the exclusion of otherwise admissible evidence is a remedy which should follow only in the most egregious cases." *Taylor, supra* at 487. "Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." *Callon, supra* at 328. Further, to establish that the trial court abused its discretion in deciding to permit the prosecution to add witnesses to be called at trial, the defendant must demonstrate that the court's ruling resulted in prejudice. *Callon, supra* at 328.

While the prosecution failed to establish good cause, the late endorsement of the two witnesses did not prejudice defendant. Johnson's preliminary examination testimony revealed that "Nyisha Thomas" (listed as a phonetic spelling) and "Tanisha" were in the car with her, her baby, and Hampton when the shooting occurred. Thus, defendant was on notice that the two witnesses at issue were in the car. Coles testified at trial that she was afraid to come in to testify, which may have been a reason why the prosecution did not endorse her earlier. After the late endorsement, defense counsel was given an opportunity to speak to the witnesses (although both witnesses refused to speak to defense counsel), and there was a one-day delay in the trial proceedings to allow defendant time to prepare for cross-examination of the witnesses. "Where the trial court adopts procedures to guarantee defendant adequate time to prepare and defendant fails to articulate any prejudice due to the late [e]ndorsement, allowing a late [e]ndorsement is not an abuse of discretion." *People v Heard*, 178 Mich App 692, 696; 444 NW2d 542 (1989). Furthermore, at trial, Norfolk testified that she was unable to identify defendant at the scene, and

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<sup>1</sup> A res gestae witness is one who witnessed some event in the continuum of the criminal transaction and whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

Coles only corroborated Johnson's testimony that defendant was involved in the shooting. As the prosecution's late endorsement of Norfolk and Coles did not prejudice defendant, and this is not one of the egregious cases for which the extreme sanction of precluding relevant evidence is reserved, *Callon, supra* at 328, the trial court's decision to allow the witnesses to testify was not an abuse of discretion.<sup>2</sup>

#### B. Evidence That Defendant Sold Marijuana

Next, defendant argues that the trial court erred in allowing irrelevant and inflammatory testimony that he sold marijuana. We disagree. We review this unpreserved, nonconstitutional issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

For "bad acts" evidence to be admissible, the following factors must be present: (1) the prosecution must offer the evidence under something other than a character or propensity theory; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.<sup>3</sup> *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Here, evidence that Hampton and Coles knew that defendant dealt drugs out of the burned-out house on 33<sup>rd</sup> Street was relevant to prove defendant's identity. Defendant presented an alibi defense, so identity was a central issue at trial. Through Hampton and Coles's testimony that defendant dealt drugs from the house, the prosecution helped prove that it was more likely

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<sup>2</sup> Although defendant also claims that his constitutional right to confrontation was denied by the prosecution's late endorsement of the witnesses, this claim is meritless, because defendant either cross-examined or had the opportunity to cross-examine the two witnesses. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis in original).

<sup>3</sup> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCR 403.

that defendant was present at the house and thus, was one of the shooters. Although evidence that defendant was a drug-dealer may have been prejudicial against him, defendant was convicted in a bench trial, and a trial court “is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling.” *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Therefore, the trial court did not commit plain error in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Further, defendant has not shown that his substantial rights were affected by the admission of this evidence. Three witnesses identified defendant as one of the people shooting at the car. Even defendant’s alibi witness testified that defendant routinely “hung out” on 33<sup>rd</sup> Street. In light of this strong evidence against defendant, defendant has failed to show that the testimony that he dealt drugs affected the outcome of the case. *Carines, supra* at 763.

#### C. Evidence That Coles Feared Defendant

Next, defendant argues that the trial court erred in allowing Coles to testify about her fear of testifying against defendant. Defendant argues that the testimony was irrelevant and unfairly prejudicial because there was no evidence that he or anyone acting for him threatened Coles. We disagree. “We review for a clear abuse of discretion the trial court’s decision to admit or exclude evidence.” *People v Houston*, 261 Mich App 463, 465; 683 NW2d 192 (2004). As discussed, evidence is relevant under MRE 401 if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MCR 403.

Here, defendant asked Coles on cross-examination if she went to the police to discuss the shooting. Coles testified that she did not. On re-direct examination, the prosecution asked Coles why she did not go to the police and if she was afraid to testify. Over defendant’s objection, Coles responded that she thought that she would be killed if she went to the police, and that she was afraid to testify. We agree with the trial court that this testimony was directly responsive to defendant’s cross-examination in which he sought to undermine Coles’s credibility with the fact that she had not gone to the police. The testimony was relevant to show why the witness was reluctant to testify and why she had not gone to the police. See, e.g., *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992) (the witness’s testimony that she was afraid that the defendant would beat her was made relevant by the defendant’s cross-examination of the witness, where he asked her if she had confronted defendant after she observed a touching incident between him and the complainant). We further conclude that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. The trial court made no mention of this issue in rendering its verdict. Furthermore, a trial court “is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling.” *Edwards, supra* at 619. Therefore, the trial court did not abuse its discretion in admitting this testimony.

#### D. Amendment of Information

Finally, defendant argues that the trial court erred in amending the information after the trial to add two counts of felonious assault, and in convicting him of these charges. Defendant contends that this deprived him of his due process right to be apprised of the charges against him. We disagree. Because defendant failed to preserve this issue by objection, we review it for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. "An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), citing MCL 767.76; see also MCR 6.112(H).

At defendant's preliminary examination, it was made clear that five people were in the car shot by defendant. However, the information charged defendant with six counts of felonious assault and listed only three of the passengers (Hampton, Johnson, and Johnson's baby), with each of these passengers listed under two counts. While making its findings of fact and conclusions of law, the trial court discovered this mistake and amended the information to charge one count for each of the passengers, this time including Norfolk and Coles. However, in doing so, the court appears to have inadvertently neglected to delete the sixth count of felonious assault.

We conclude that the trial court's amendment of the information did not result in "unfair surprise or prejudice" to defendant. MCR 2.6112(H). Because no new offense was charged, defendant's right to receive a preliminary examination on the amended information was not violated. *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994). Instead, the amendment merely corrected the duplication of the names of the victims by substituting them with the names of the omitted victims. An information is presumed to have been framed with reference to the facts disclosed at the preliminary examination. *People v Hunt*, 442 Mich 359, 363; 501 NW2d 151 (1993). Because the preliminary examination revealed that there were five people in the car, defendant was not unfairly surprised or prejudiced when the names in the information were changed to reflect five victims, as opposed to three. No new evidence was needed to support the charges in the amended information. The amended information merely expressed what defendant already knew through the testimony at the preliminary examination. The amendment was a proper and effective means of curing a deficiency in the original information. See *Weathersby, supra* at 104. Furthermore, defendant does not articulate how he was prejudiced by the amendment. Therefore, the trial court's amendment of the information was not a plain error that affected defendant's substantial rights.

Although defendant does not raise this issue, we note that defendant's judgment of sentence contains an error. While the trial court found defendant guilty of five counts of felonious assault, one for each passenger of the car, the judgment of sentence indicates that

defendant was convicted of six counts of felonious assault. Therefore, we remand to the trial court for correction of the judgment of sentence to reflect that defendant was convicted of five counts of felonious assault.

Affirmed, but remanded for correction of judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Helene N. White

/s/ Michael J. Talbot